



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 271

[Docket No. FRA-2021-0035, Notice No. 1]

RIN 2130-AC89

Risk Reduction Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: In response to issues raised by a petition for reconsideration of the Risk Reduction Program (RRP) final rule, FRA is issuing this NPRM to solicit information to help determine whether FRA should retain or remove a provision in the RRP final rule clarifying that contractors who perform a significant portion of a railroad's operations are considered the railroad's directly affected employees for purposes of the RRP rule.

DATES: Comments on this proposed rulemaking must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

ADDRESSES: *Comments:* Comments related to Docket No. FRA-2021-35 may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <https://www.regulations.gov> including any

personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and follow the online instructions for accessing the docket.

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I. Background

Risk reduction is a comprehensive, system-oriented approach to improving safety by which an organization formally identifies and analyzes applicable hazards and takes action to mitigate, if not eliminate, the risks associated with those hazards. It provides a railroad with a set of decision-making processes and procedures that can help it plan, organize, direct, and control its railroad operations in a way that enhances safety and promotes compliance with regulatory standards. As such, risk reduction is a form of safety management system, which is a term generally referring to a comprehensive, process-oriented approach to managing safety throughout an organization.

A. Statutory Mandate

On October 16, 2008, the Rail Safety Improvement Act of 2008 (RSIA) was enacted. Section 103 of the RSIA, codified at 49 U.S.C. 20156, directed the Secretary of Transportation (Secretary) to issue a regulation requiring Class I railroads, railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads), and railroads with inadequate safety performance (ISP railroads) to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. Under sec. 20156(g), each railroad carrier required to submit a railroad safety risk reduction program must “consult with, employ good faith, and use its best efforts to reach agreement with, all of its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.”

The Secretary delegated the authority to conduct this rulemaking and implement the rule to the Federal Railroad Administrator.¹

B. Rulemaking Background

On February 27, 2015, FRA responded to the RSIA mandate by publishing an RRP NPRM that would apply to each Class I freight railroad and each ISP railroad. The RRP NPRM explained it would not implement the RSIA mandate for passenger railroads, which FRA was addressing in a separate System Safety Program (SSP) rulemaking. On August 12, 2016, FRA published an SSP final rule² applying to passenger rail operations.³

On February 18, 2020, FRA published an RRP final rule⁴ that added regulations at 49 CFR part 271 (part 271) requiring each Class I freight railroad and each ISP railroad to develop and implement an RRP under a written RRP plan that FRA has reviewed and approved.⁵ The RRP final rule contains the following requirements that relate to how an RRP must engage a railroad's directly affected employees:

- Section 271.207(a), as mandated by sec. 20156(g), requires each railroad to consult in good faith, and best efforts to reach agreement with, its directly affected employees (including any non-profit labor organization representing the directly affected employees) on the contents of its RRP plan.
- For RRP plan substantive amendments, section 271.303(a)(1) requires a railroad to follow the process described in its RRP plan, pursuant to § 271.209, for consulting with its directly affected employees and submitting a consultation statement to FRA.

¹ 49 CFR 1.89(b).

² 81 FR 53850.

³ On March 4, 2020, FRA published a final rule amending the SSP rule to clarify its applicability to passenger rail operations. 85 FR 12826, 12829-12833.

⁴ 85 FR 9262.

⁵ 49 CFR 271.101(b).

- Section 271.113(a) requires a railroad to involve its directly affected employees in the establishment and implementation of its RRP.
- Section 271.221 requires a railroad's RRP plan to describe the railroad's processes for involving railroad employees in the establishment and implementation of an RRP pursuant to § 271.113. If a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered employees.

The RRP final rule does not contain a definition for “directly affected employee.”

However, the rule clarifies in § 271.3(c) that “[i]f a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered directly affected employees for purposes of this part.”

While FRA did not propose § 271.3(c) in the RRP NPRM, the preamble to the RRP final rule explained that the added language came from 49 CFR 270.107(a)(2) of the SSP rule, and was necessary to address how directly affected employee consultation and involvement would be handled when a railroad contracts out significant portions of its operations to other entities.⁶ The preamble further explained that contractors and contractor employees would be considered directly affected employees only when the contracts were ongoing and involved significant aspects of the railroad's operations (e.g., contracting out maintenance of locomotives and rail cars).⁷ The preamble encouraged railroads to contact FRA for guidance if they were unsure whether a contracted entity and its employees would be directly affected employees under § 271.3(c).⁸ For purposes of

⁶ 85 FR 9277.

⁷ *Id.*

⁸ *Id.*

this NPRM, FRA will refer to this population of § 271.3(c) contractors as “operationally significant contractors.”

C. Petition for Reconsideration

On April 10, 2020, FRA received a petition for reconsideration of the RRP final rule from the Association of American Railroads (AAR).⁹ AAR’s petition asked FRA to reconsider certain aspects of the final rule, including requirements regarding both employee and contractor involvement.¹⁰ Relevant to this NPRM, AAR asked FRA, to reconsider the inclusion of § 271.3(c).¹¹ As explained above, § 271.3(c) requires a railroad to consider a contractor and its employees who perform significant portions of the railroad’s operations (i.e., operationally significant contractors) as directly affected employees for purposes of RRP plan consultation (§ 271.207) and employee involvement (§ 271.113(a)).

In asking FRA to consider removing § 271.3(c) from the RRP final rule, AAR’s petition argued that while the inclusion of contractor employees may be appropriate in the SSP rule for passenger railroads that contract out their entire operations, the same is not true for Class I freight railroads.¹² As such, AAR argued that including § 271.3(c), without corresponding safety justifications or notice and opportunity to comment, was arbitrary and unreasonable.¹³ AAR further argued that FRA did not adequately define a “significant portion” of a railroad’s operation or account for costs associated with § 271.3(c).¹⁴

⁹ FRA-2009-0038-0116.

¹⁰ AAR’s petition also asked FRA to reconsider requirements regarding implementation deadlines and FRA’s methodology and accompanying costs calculations used to determine which railroads demonstrate ISP. On May 8, 2020, FRA provided an initial response to AAR’s petition, denying AAR’s request to extend the implementation deadlines in the RRP final rule. FRA-2009-0038-0117. FRA’s response stated that the agency would reply to AAR’s petition regarding employee/contractor involvement and ISP determinations in a separate communication.

¹¹ AAR Pet. at 8-10.

¹² AAR Pet. at 8.

¹³ *Id.*

¹⁴ *Id.* at 8-10.

FRA responded to AAR's petition on November 16, 2020, granting the petition in part by stating it would initiate a rulemaking to consider removing § 271.3(c) from the RRP final rule.¹⁵ FRA's response indicated a rulemaking would allow a thorough discussion of whether the RRP final rule should include § 271.3(c), taking into account both Class I railroads, which FRA acknowledged may not contract out significant portions of their operations to the extent that § 271.3(c) would apply, and ISP railroads.

FRA's response also acknowledged that a rulemaking to remove § 271.3(c) may not be completed before the arrival of certain implementation deadlines in the rule for Class I freight railroads. FRA's response, therefore, made clear that, through its enforcement discretion, FRA intended to neither take enforcement action based on § 271.3(c) nor disapprove a Class I freight railroad's RRP plan on grounds that it did not comply with § 271.3(c) before the rulemaking was completed.

Since issuing this response, FRA has received and approved RRP plans from all seven Class I freight railroads. Consistent with AAR's petition, none of the Class I railroad RRP plans stated that the railroads use operationally significant contractors. FRA also did not receive any statement from directly affected employees implicating § 271.3(c) concerns as part of the RRP plan consultation process.¹⁶ FRA has not yet identified which Class II or III freight railroads must comply with the RRP final rule because they demonstrate ISP.

II. Discussion

This NPRM solicits information to help FRA determine whether § 271.3(c) should be retained in or removed from the RRP final rule. For reasons discussed below, this NPRM does not specifically propose removing § 271.3(c) because FRA currently believes the provision should be retained. However, FRA may issue a final rule

¹⁵ FRA otherwise denied AAR's petition. FRA-2009-0038-0124.

¹⁶ Section 271.207(e).

removing § 271.3(c) and making any necessary conforming changes (such as removing similar language from § 271.221) in response to public comment.

A. FRA's Rationale for Retaining § 271.3(c)

For reasons explained in the preamble to the RRP final rule, FRA continues to maintain that § 271.3(c) is necessary in the RRP final rule.¹⁷ Specifically, § 271.3(c) contains language from § 270.107(a)(2) of the SSP rule,¹⁸ and is necessary to address how directly affected employee consultation and involvement will be handled when a railroad contracts out significant portions of its operations to operationally significant contractors.¹⁹ FRA intends the scope of § 271.3(c) to be limited so that contractors and contractor employees are considered operationally significant contractors (and thereby treated as directly affected employees for purposes of the RRP rule) only when the contracts are ongoing and involve significant aspects of the railroad's operations (e.g., contracting out maintenance of locomotives and rail cars or dispatching services).²⁰ For example, § 271.3(c) would cover contractor employees who were performing duties for a railroad on a daily basis, particularly if those duties were necessary for the daily operations of a railroad. If a contractor performs operations for a railroad only on a one-time or intermittent basis, the limited scope of § 271.3(c) would not apply because these duties would not constitute a significant portion of the railroad's operations. By illustration, § 271.3(c) would not apply to contractors hired for a one-time construction project of limited duration or to contractors who may only provide the railroad services on an as-needed or intermittent basis (such as environmental response contractors who respond to a hazardous materials leak or accident-clearing contractors).

¹⁷ 85 FR 9277.

¹⁸ There were no petitions for reconsideration of § 270.107(a)(2) of the SSP rule.

¹⁹ 85 FR 9277.

²⁰ *Id.*

As explained in FRA's response to AAR's petition, FRA acknowledges that § 271.3(c) may not currently impact Class I railroads – indeed, FRA has already approved all Class I freight railroad RRP plans without identifying any potential operationally significant contractors. FRA's review, however, focused primarily on information provided in the submitted Class I RRP plans, and any statements received from directly affected employees, and was not a comprehensive evaluation of a railroad's operations. FRA notes, however, that even if Class I railroads currently do not hire operationally significant contractors, that does not mean they will not do so in the future.

FRA does not believe a current lack of Class I operationally significant contractors is sufficient reason for removing § 271.3(c) altogether because AAR's argument does not address Class II and Class III railroads that may be subject to the RRP rule because FRA determines they demonstrate ISP. There is a large amount of organizational diversity among Class II and Class III freight railroads, and FRA believes some of these Class II and Class III freight railroads may hire operationally significant contractors.

Finally, FRA notes that there may be adverse railroad safety effects if the RRP rule treats operationally significant contractors and employees differently by not requiring a railroad to consult with and involve operationally significant contractors in RRP planning and implementation. Contractors perform a range of important railroad operation services, such as dispatching, switching, track construction, and flagging. FRA is also aware of contractors who provide certified locomotive engineers and conductors to conduct train operations. To comprehensively address the hazards and risk on a railroad's system, FRA believes an RRP must treat operationally significant contractors the same as employees for purposes of the rule's consultation and involvement requirements. For example, a person who is regularly performing dispatching services for a railroad should be consulted on the contents of a railroad's RRP plan and involved

in the railroad's RRP, regardless of whether that person is an employee or a contractor.²¹ The comprehensive, system-wide nature of RRP also makes it important for a railroad to incorporate operationally significant contractors directly into its RRP, rather than requiring contractors to establish their own RRP that would then apply piecemeal to a railroad's operation. This type of fragmented approach could lead to safety gaps where it was not clear whether the operation was covered by the railroad's RRP or the contractor's RRP, or where safety hazards and risks were not effectively communicated between the railroad and operationally significant contractors.

B. Exercise of Enforcement Discretion if FRA Retains § 271.3(c)

Until the conclusion of this rulemaking, and as indicated in its response to AAR's petition,²² FRA will continue to exercise its discretion to neither take enforcement against a Class I freight railroad based on § 271.3(c) nor to disapprove a Class I freight railroad's RRP plan on grounds that it did not comply with § 271.3(c).

As discussed above, based on the information available to FRA, FRA understands that, at this time, Class I freight railroads do not employ operationally significant contractors. If Class I freight railroads indeed do not hire operationally significant contractors, their RRP plans would remain in compliance with the rule even if FRA elects to retain § 271.3(c). FRA would, however, monitor for § 271.3(c) compliance as part of its external audit process under Part 271, Subpart F – External Audits. If FRA were to find during an audit that a Class I freight railroad utilizes operationally significant contractors, FRA would address any identified § 271.3(c) non-compliance as part of the audit process, which could include reopening review of the railroad's RRP plan pursuant to § 271.305.²³

²¹ The importance of contractors to railroad safety is reflected in the numerous FRA safety regulations that define "employee" to include employees of a contractor to a railroad. *See, e.g.*, 49 CFR 214.7 (definitions of "employee," "roadway worker," and "railroad bridge worker or bridge worker"), § 218.93 (definition of "employee"), § 220.5 (definition of "employee"), and § 241.5 (definition of "employee").

²² FRA-2009-0038-0124.

²³ Section 271.305 authorizes FRA to reopen review of an RRP plan for cause stated.

FRA may receive information during this rulemaking indicating that one or more Class I freight railroads do hire operationally significant contractors. If FRA finalizes this rulemaking by retaining § 271.3(c), FRA will continue exercising its enforcement discretion to provide any such Class I freight railroads a reasonable amount of time to amend their RRP plans and conduct any additional consultation necessary to achieve compliance with § 271.3(c). FRA specifically requests public comment on what would be a reasonable amount of time, anticipating that it would be between six months and one year. Providing six months would be consistent with the amount of time provided Class I freight railroads to file initial RRP plans after the rule's information protection provisions went into effect,²⁴ and providing a year would allow a Class I freight railroad the opportunity to submit any required RRP plan revisions along with its annual internal assessment report,²⁵ which would lessen administrative filing burdens. After this additional period of enforcement discretion, FRA would have the authority under § 271.305 to reopen review of a Class I freight railroad's RRP plan for cause stated, such as non-compliance with § 271.3(c).

C. Information Requested

Although FRA currently believes § 271.3(c) should be retained, this NPRM solicits additional information for FRA to consider. FRA specifically requests comments on whether contractors play a different role for Class I freight railroads and Class II and III freight railroads (which would have to comply with the RRP rule if FRA determines they demonstrate ISP). FRA is also interested in additional information regarding the extent to which contractors perform operations for freight railroads and for how long FRA should exercise its enforcement discretion if it determines that Class I freight

²⁴ The rule's information protection provisions went into effect on February 17, 2021, and the filing deadline for Class I freight railroad RRP plans was no later than August 16, 2021. 49 CFR 271.11(a) and 271.301(b)(1).

²⁵ The RRP rule requires a railroad to conduct an internal assessment of its RRP once every calendar year, and to provide FRA an internal assessment report within 60 days of completing the internal assessment. 49 CFR 271.401(a) and 271.405(a).

railroads do hire operationally significant contractors. FRA is requesting information not only about the current role of contractors in the freight railroad industry, but also information about how contractors' role may change in the future.

As this NPRM is only addressing those issues raised in the petition for reconsideration, FRA is specifically limiting the requested public comment to the need to retain or remove § 271.3(c). For purposes of this NPRM, FRA will not consider any comments that go beyond the scope of § 271.3(c). For example, FRA will not consider comments on the employee consultation requirements in § 271.207, comments on the employee involvement requirements in § 271.113, or comments requesting revisions to any section of the rule other than § 271.3(c).

As discussed under the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document, if you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

III. Regulatory Impact and Notices

A. Executive Order 12866

This NPRM is a nonsignificant regulatory action under Executive Order 12866, "Regulatory Planning and Review."²⁶ FRA made this determination by finding that this proposed regulatory action did not meet the definition of "significant regulatory action" in section 3(f) of EO 12866.

This section evaluates the economic impacts associated with the proposed rulemaking. Because FRA is proposing to retain § 271.3(c) in the RRP rule to address how directly affected employee consultation and involvement will be handled when a railroad contracts out significant portions of its operations to operationally significant contractors, this proposed rulemaking will not have an economic impact unless FRA

²⁶ 58 FR 51735 (Sep. 30, 1993).

revises the provision in response to information and comments gathered following publication of this NPRM. The economic impacts of such potential alternatives are described below. FRA requests comments and data related to § 271.3(c) and the assumptions and calculations presented in this analysis.

1. Need for Regulatory Action

This NPRM does not propose to make any regulatory change to the existing RRP rule. Rather, this NPRM provides an opportunity for public comment on § 271.3(c), which was included in the RRP final rule but not proposed in the RRP NPRM. This rulemaking provides an expanded opportunity for public comment on this section. Under § 271.3(c), “If a railroad contracts out significant portions of its operations, the contractor and the contractor’s employees performing the railroad’s operations shall be considered directly affected employees for purposes of this part.” For ease of reference, this analysis refers to this universe of § 271.3(c) contractors as “operationally significant contractors.” As previously explained in this rulemaking, the RRP rule contains two requirements that relate to how an RRP must engage with a railroad’s directly affected employees in §§ 271.207(a) (RRP plan consultation) and § 271.113(a) (employee involvement). Generally, these provisions require a railroad to consult with its directly affected employees on the contents of its RRP plan and any substantive amendments thereto, and to involve its directly affected employees in the establishment and implementation of the RRP.

This NPRM notes FRA may consider alternatives to § 271.3(c), given sufficient data and evidence of an unjustified burden or superior approach. Since this proposed rulemaking is primarily an effort to collect public comment on § 271.3(c) and does not propose new requirements, this analysis determined that this proposed rulemaking would not carry any economic impacts or paperwork burden. While the proposed rule would

not have economic impacts, FRA examined two alternatives that would trigger costs and/or benefits if included in a final rule.

2. Regulatory Alternatives

This analysis considers two alternative regulatory approaches to retaining § 271.3(c) in the RRP final rule, including the alternative of removing § 271.3(c), which is considered in this proposed rulemaking and associated preamble. The assumptions and calculations upon which the analyses are based are included below to provide clarity and document FRA's methodology.

The first alternative considers the removal of § 271.3(c) and would generate an estimated \$4,069,640 in cost savings. The second alternative considers expanding § 271.3(c) to include all contractors who perform or utilize significant safety-related services, as identified by a railroad's RRP plan pursuant to § 271.101(d). For ease of reference, this analysis refers to § 271.101(d) contractors as "safety significant contractors." This analysis also assumes all operationally significant contractors are included in this broader category of safety significant contractors. This second alternative would trigger an estimated \$1,887,473 in costs.

Per U.S. Office of Management and Budget (OMB) guidance in Circular A-4, the alternatives considered in this analysis present both a less stringent case (Alternative 1) and a more stringent case (Alternative 2) compared to the baseline case expected for the proposed rulemaking if finalized.²⁷ As discussed above, this rulemaking proposes to retain § 271.3(c) to address how directly affected employee consultation and involvement will be handled when a railroad contracts out significant portions of its operations. The proposed rulemaking would therefore not generate any economic impacts if finalized, and this analysis only addresses the economic impacts of the two alternatives in comparison to the baseline case of retaining § 271.3(c).

²⁷ U.S. Office of Management and Budget. 2003. Circular A-4. Washington, DC.

Table I.1: Summary of Regulatory Alternatives for Analysis

	Baseline Case: Retain § 271.3(c)	Alt. 1: Remove § 271.3(c)	Alt. 2: Expand § 271.3(c)
Affected Workers	Railroad employees and operationally significant contractors	Railroad employees only	Railroad employees and safety significant contractors

3. Methodology

This analysis employs benefit-cost analysis to evaluate more and less stringent regulatory alternatives. The baseline case is not evaluated because it presents the expected steady state of the economy without additional regulatory action. The analysis presents each case in monetary values to facilitate comparison. The value of the variables included are based on industry research, subject matter expertise, and a list of stated assumptions listed below.

Alternative 1 is narrower than the baseline case and is expected to produce cost savings, while Alternative 2 is broader than the baseline case and is expected to increase costs.²⁸ To calculate the net cost savings of Alternative 1, which would drop the requirement for railroads to consider operationally significant contractors as directly-affected employees for purposes of the RRP rule by removing § 271.3(c), the analysis estimates the expected costs of compliance with that provision and assumes the entirety of those costs would be removed. To calculate the net costs of Alternative 2, which would expand § 271.3(c) beyond operationally significant contractors in the baseline case to include all safety significant contractors, the analysis estimates the total compliance costs of the broader alternative and then removes the estimated compliance costs of the

²⁸ This analysis does not attempt to quantify a monetary value for the costs or savings associated with each alternative's potential impact on safety risk (e.g., the marginal impact of including additional contractors in the RRP consultation pool) because the amount of uncertainty exceeds the confidence FRA has that it could correctly estimate these figures. Rather, the analysis focuses exclusively on the anticipated administrative costs and savings associated with the proposed alternatives because the data needed to evaluate them are more readily available. For a qualitative discussion of the safety benefits associated with retaining § 271.3(c) in the RRP rule, please see the background discussion for this proposed rulemaking.

baseline case (i.e., the amount estimated for Alternative 1). The number of contractors impacted is the only variable that changes in the calculations.²⁹

The scope of this analysis covers Class I freight railroads and potential ISP railroads.³⁰ It applies a ten-year period of analysis that is long enough to capture ongoing costs without unduly predicting longer term impacts, which are liable to shift as the industry evolves. The first year of the analysis term is assumed to be the year of the effective date of a final rule arising from this NPRM. All Class I railroads have already consulted with directly affected employees and submitted their initial RRP plans, which FRA has reviewed and approved. However, FRA's response to AAR's petition notified these railroads that it would exercise enforcement discretion regarding § 271.3(c) as it worked on this rulemaking. Therefore, this analysis assumes that upon promulgation of this rulemaking, Class I railroads would perform an initial consultation with the applicable contractors. Because it is currently unclear whether Class I railroads hire operationally significant contractors to whom § 271.3(c) would apply, this assumption may result in exaggerated savings and costs for Alternatives 1 and 2, respectively, which FRA finds preferable to underestimating the impact. FRA welcomes comments and data on whether railroads have treated any contractors as directly affected employees in their RRP plan development and the extent to which railroads contract out their operations.

Over the course of the analysis' time horizon, FRA expects the total number of ISP railroads will increase, starting with 10 in the first year and adding 5 each year thereafter. FRA subject matter experts expect the number of ISP railroads will plateau as safety operations are improved, as the poorest performing railroads correct their practices

²⁹ Baseline = (Railroad Employees + Operationally Significant Contractors). Alternative 1 = Baseline – Operationally Significant Contractors = Railroad Employees only. Alternative 2 = Baseline + Safety Significant Contractors.

³⁰ FRA uses a statistical process guided by expert review to determine which railroads demonstrate inadequate safety performance. Essentially, FRA compares a railroad to its peers and evaluates its three-year accident/incident history, and operational characteristics to see if its performance is significantly different than comparable railroads.

in the initial years of the program, and risk reduction planning becomes more engrained in railroad culture at large.³¹ The number of ISP railroads may decline following the ten-year analysis term for these same reasons, but such a scenario is not included in the scope of this analysis. FRA anticipates that as the industry realizes the benefits of the RRP process, more railroads will engage in risk reduction planning voluntarily (as permitted by § 271.15), which is another reason for not extending the analysis of the rule's impact beyond ten years.

The Class I freight railroads' costs are front-loaded in the first year of the rule because FRA's analysis assumes they will consult with operationally significant contractors and amend their RRP plans within that year to ensure § 271.3(c) compliance (unlike a Class II or Class III freight railroad, which will only submit an RRP plan if FRA determines that it demonstrates ISP). The analysis assumes the number of Class I freight railroads (currently 7) will not change over the ten-year time horizon.³²

This analysis does not separate the impacts by country among the Class I or ISP freight railroads. OMB Circular A-4 instructs that regulatory impact analyses should focus on the impacts on U.S. residents; however, consistent with FRA practice, the impacts of the rule associated with the two Canada-based Class I freight railroads, Canadian National and Canadian Pacific (as well as any international Class II or III freight railroads under FRA jurisdiction), are included in this analysis because they operate extensively in the U.S. and the process of filtering out the relevant country-specific impacts would be prohibitively extensive.

4. Baseline

³¹ Under the RRP final rule, an ISP railroad may petition FRA to discontinue compliance after five years. 49 CFR 271.13(g).

³² FRA is aware of potential mergers within the Class I freight railroad industry. However, this analysis assumes the number of Class I railroads will remain unchanged over the ten-year time horizon of the proposed rulemaking. Notably, even in the case of a merger, FRA assumes the number of Class I railroad employees would be expected to be unaffected by the merger.

In most economic and regulatory impact analyses, the “no action alternative” is an important case to consider and contrast with the proposed rulemaking. In the case of this proposed rulemaking, which is a follow-up to the RRP final rule, the “no action” baseline is the expected course if a final rule arises from this proposed rulemaking. Because FRA believes the RRP rule should retain § 271.3(c) to address railroads with operationally significant contractors, this NPRM proposes no changes to the RRP final rule as it was published on February 18, 2020. Rather, this rulemaking is intended to solicit and receive feedback on FRA’s position that § 271.3(c) should be retained. Therefore, the baseline is assumed to be the current state of the industry under the RRP final rule as promulgated. FRA measures the impact of the alternatives relative to this base case.

5. Scope

The sections of the RRP rule that apply to the operationally significant contractors under § 271.3(c) include the following:

- Section 271.207 – Consultation requirements, which requires a railroad to “consult with, employ good faith, and use its best efforts to reach agreement with” all directly affected employees;
- Section 271.303(a)(1) – Amendments, which requires a railroad to follow the process, described in its RRP plan pursuant to § 271.209, for consulting with its directly affected employees and submitting a consultation statement to FRA for substantive amendments to its RRP plan.
- Section 271.113 – Involvement of railroad employees, which requires a railroad to involve its directly affected employees in the establishment and implementation of the RRP. Section 271.221 – Involvement of railroad employees process requires an RRP plan to describe the railroad’s processes for involving railroad employees in the establishment and

implementation of an RRP under § 271.113, and repeats the § 271.3(c) requirement that if a railroad contractors out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered directly affected employees for the purposes of this section.

6. Calculations

The following section-by-section calculation formulas are applied to each of the two alternatives presented, which include either operationally significant contractors or safety significant contractors. The calculations in this analysis are applied to Class I and ISP freight railroads separately. The values of the variables for these two types of railroads differ and are displayed in the Assumptions list of this analysis. For clarity, the calculations below are presented in simplified form. Furthermore, the calculations apply to each year of the analysis, with the values of the variables changing each year according to the assumptions listed below.

Section 271.207 – Consultation Requirements

Initial Consultation:

*(Number of RRs Conducting RRP Plan Consultations * Administrative Time Spent on Consultation * Administrative Wage Rate) + (Average Number of Contractors * Contractor Time Spent on Consultation * Contractor Wage Rate)*

Consultation Revision Tasked by FRA:

*(Number of RRs Tasked w/ Revision * Administrative Time Spent for Revision * Administrative Wage Rate) + (Average Number of Contractors * Contractor Time Spent Consulting for Revisions * Contractor Wage Rate)*

Section 271.303(a)(1) – Amendments

*(Number of RRs Amending RRP Plans * Administrative Time for Update Process * Administrative Wage Rate) + (Total Contractors Involved * Time Spent per Contractor*

*on Update Process * Contractor Wage Rate)*

Section 271.113 – Involvement of Railroad Employees

*(Number of RRs Conducting Ongoing Involvement * Administrative Time Spent * Administrative Wage Rate) + (Average Number of Contractors * Average Contractor Time Spent on Ongoing Involvement * Contractor Wage Rate)*

7. Analysis of Alternatives

Alternative 1: Remove the Operationally Significant Contractor Engagement Component

The first case analyzes the primary alternative of removing § 271.3(c). This case is the less stringent alternative. It evaluates the potential savings that would accrue to Class I and ISP freight railroads by not having to comply with the existing requirement to include operationally significant contractors as directly affected employees for purposes of RRP plan consultation and ongoing RRP involvement. However, the resultant benefits must be analyzed alongside FRA's position that the inclusion of such operationally significant contractors as directly affected employees, both in terms of added safety and in regulatory clarity by maintaining continuity between both the RRP (for freight railroads) and SSP (for passenger railroads) rules, is more valuable.

If Alternative 1 were adopted, the railroads could experience marginally lower costs by saving compliance costs for including operationally significant contractors as directly affected employees in their RRP process. Over the 10-year analysis, these benefits are estimated to be \$4,069,640 and are displayed in Tables 1.1 and 1.2, along with totals at both 3 and 7 percent discount rates. Table 1.1 presents the anticipated savings arising from not incurring costs from including operationally significant contractors as directly affected employees in railroad RRP processes. Table 1.2 delineates the year-by-year benefits anticipated.

Table 1.1: Total Savings from Removing Section 271.3(c)							
	Initial Consultation (271.207)	Consultation Revision Tasked by FRA (271.207, pt 2)	Resubmission Due to RRP Revision (271.209)	Ongoing Involvement (271.213)	Total	Discounted, 3%	Discounted, 7%
Class I RRs	\$1,027,384	\$290,110	\$222,285	\$2,034,044	\$3,573,823	\$3,203,815	\$2,816,054
ISP RRs	\$187,898	\$14,505	\$46,033	\$247,382	\$495,817	\$415,735	\$334,952
					\$4,069,640	\$3,619,549	\$3,151,006

Table 1.2: Year-by-Year Savings from Removing Section 271.3(c)											
Total Cost by Year											
	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Total
Class I RRs	\$1,543,127	\$225,633	\$225,633	\$225,633	\$225,633	\$225,633	\$225,633	\$225,633	\$225,633	\$225,633	\$3,573,823
ISP RRs	\$45,829	\$31,942	\$36,457	\$40,971	\$45,485	\$49,999	\$54,513	\$59,027	\$63,541	\$68,055	\$495,817
Yearly Total	\$1,588,955	\$257,575	\$262,089	\$266,604	\$271,118	\$275,632	\$280,146	\$284,660	\$289,174	\$293,688	\$ 4,069,640
Discounted, 3%	\$1,542,675	\$242,789	\$239,849	\$236,874	\$233,868	\$230,837	\$227,784	\$224,713	\$221,628	\$218,531	\$ 3,619,549
Discounted, 7%	\$1,485,005	\$224,976	\$213,943	\$203,391	\$193,303	\$183,665	\$174,461	\$165,675	\$157,291	\$149,296	\$ 3,151,006

Alternative 2: Expand § 271.3(c) to Include Safety Significant Contractors

The second alternative presents a scenario in which Class I and ISP freight railroads must expand the universe of contractors that they consider directly affected employees for RRP purposes (i.e., RRP plan consultation and ongoing employee involvement) to include all safety significant contractors identified in their RRP plans under § 271.101(d). This case is the more stringent alternative. FRA's proposed position is that § 271.3(c) should remain tailored to apply only to those contractors who perform operationally significant work for the railroads. Based on the information available, FRA has determined that this narrowed scope of operationally significant contractors

accomplishes the intended goal of the RRP rule without unduly burdening the industry. Furthermore, expanding § 271.3(c) would make the RRP rule inconsistent with the SSP rule, and FRA has no data indicating freight and passenger railroads should be subject to different contractor requirements. However, it could be the case that requiring railroads to include more contractors as directly affected employees could lead to better input in their RRP, with corresponding safety and operational benefits. While it is conceivable there could be marginal safety benefits from the addition of more information from the expanded universe of contractors, FRA lacks information to define or to quantify such benefits at this time. Furthermore, based on subject matter experience, FRA expects this approach would cost more than it would provide in safety benefits.

If the baseline universe of operationally significant contractors were expanded to include other safety significant contractors, the additional consultations and involvement to integrate these additional workers into the railroads' RRP processes would increase the cost of the rule. There would also be marginally higher administrative costs to accommodate the expansion of the number of contractors included, but FRA did not attempt to estimate those costs here because it believes they would be relatively minimal. It is also possible that an expansion of the application of § 271.3(c), and thereby the RRP consultation and involvement requirements, to more contractors would eventually impact contract costs for these workers who must now engage in additional tasks. FRA did not include estimates for these impacts because it lacked data to make a confident estimate. The total cost of Alternative 2 over the ten-year analysis is estimated to be \$1,887,473 and the details are displayed in Tables 2.1 and 2.2, along with totals at both 3 and 7 percent discount rates.

Table 2.1: Total Costs from Expanding Section 271.3(c)							
	Initial Consultation (271.207)	Consultation Revision Tasked by FRA	Resubmission Due to RRP	Ongoing Involvement (271.213)	Total	Discounted, 3%	Discounted, 7%

		(271.207, pt 2)	Revision (271.209)				
Class I RRs	\$501,694	\$143,341	\$95,561	\$1,003,388	\$1,743,983	\$1,563,673	\$1,374,692
ISP RRs	\$51,098	\$10,252	\$21,750	\$60,389	\$143,490	\$120,432	\$97,160
					\$1,887,473	\$1,684,105	\$1,471,852

Table 2.2: Year-by-Year Costs from Expanding Section 271.3(c)											
Total Cost by Year											
	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Total
Class I RRs	\$754,930	\$109,895	\$109,895	\$109,895	\$109,895	\$109,895	\$109,895	\$109,895	\$109,895	\$109,895	\$1,743,983
ISP RRs	\$13,682	\$9,368	\$10,632	\$11,896	\$13,159	\$14,423	\$15,687	\$16,950	\$18,214	\$19,478	\$143,490
Yearly Total	\$768,612	\$119,263	\$120,527	\$121,791	\$123,054	\$124,318	\$125,582	\$126,845	\$128,109	\$129,373	\$1,887,473
Discounted, 3%	\$746,225	\$112,417	\$110,299	\$108,209	\$106,148	\$104,114	\$102,109	\$100,133	\$98,185	\$96,265	\$ 1,684,105
Discounted, 7%	\$718,329	\$104,169	\$98,386	\$92,913	\$87,736	\$82,838	\$78,206	\$73,825	\$69,683	\$65,767	\$ 1,471,852

8. Results of Alternatives Analysis

The analysis of the two alternatives above demonstrates that there would be measurable economic impacts to selecting either path. If upon receiving public input on this proposed rulemaking FRA decides to remove § 271.3(c) from the final rule in line with Alternative 1, there would be an anticipated cost savings to the regulated entities of \$4,069,640 (\$3,619,549, discounted at 3 percent; \$3,151,006, discounted at 7 percent). If FRA decides to expand § 271.3(c) in line with Alternative 2, the result would be an anticipated total cost increase for the regulated entities of \$1,887,473 (\$1,684,105, discounted at 3 percent; \$1,471,852, discounted at 7 percent). FRA does not have data to quantify monetarily the safety impacts of either removing or expanding § 271.3(c). Nevertheless, FRA believes retaining § 271.3(c) in the RRP rule is consistent with the

systemic approach of a safety risk management program, for reasons explained in the background section of this proposed rulemaking. FRA welcomes data and comment on the impacts of eliminating or expanding the applicability of § 271.3(c) to inform the final rule.

Regulatory Path	Action	Cost	Benefits
Baseline	Maintain § 271.3(c) as is	0	0
Alternative 1	Remove § 271.3(c)	N/A	\$ 4,069,640
Alternative 2	Expand contractor pool subject to § 271.3(c)	\$ 1,887,473	N/A

9. Assumptions and Inputs

These assumptions are based on published industry and economic data, FRA data, and FRA subject matter expertise. These assumptions include definitions for certain variables that were not included in the initial RRP rule. Since the publication of the RRP rule, FRA has reviewed submitted Class I freight railroad plans and gathered more information and experience on the RRP process and anticipated resources needed to comply. Accordingly, FRA has updated the calculations and assumptions to reflect this improved understanding in evaluating the regulatory alternatives above. FRA requests comment on the assumptions and welcomes any data that may contribute to better understanding how the retention, exclusion, or expansion of § 271.3(c) might impact railroads.

Railroads

There are 7 Class I freight railroads. There are 784 total railroads on the general system.³³ There will be 10 ISP freight railroads in Year 1, and an additional 5 per year in Years 2-10. Once designated as ISP, FRA assumes railroads will not cease to be

³³ Based on 2021 FRA data.

designated as such during the ten-year analysis time horizon.³⁴ There are 135,000 Class I railroad employees. The average number of employees on an ISP railroad is 125. The number of employees is assumed to remain constant over the ten-year analysis term. One Class I railroad will amend its RRP each year. Ten percent of ISP railroads will amend their RRP each year.

Contractors

Contractors who are operationally significant account for 10 percent of a Class I railroad's total workforce. Contractors who are safety significant account for 15 percent of a Class I railroad's total workforce. Contractors who are operationally significant account for 20 percent of an ISP railroad's total workforce. Contractors who are safety significant account for 30 percent of an ISP railroad's total workforce. For the purpose of this analysis, operationally significant contractors are considered to be fully subsumed in the safety significant contractor pool.

Wages

Overhead and fringe costs impose a 75 percent multiplier on average worker wages, which are reflected in the following wage rates. The fully burdened wage rate for professional and administrative railroad staff is \$77.91.³⁵ The fully burdened wage rate for railroad contractors is equivalent to average railroad employees, which is \$59.46. Average wage rates are equivalent between Class I and ISP railroads. Wages are not adjusted for inflation for the ten-year time horizon of the rule.

Time

³⁴ Under the RRP final rule, an ISP railroad may petition FRA to discontinue compliance after five years. Section 271.13(g). FRA is assuming ISP railroads would continue to be designated as such for ten years to avoid underestimating costs in this analysis, not to imply that all ISP railroads will be required to comply for ten years.

³⁵ The wage data in this analysis are based on railroad wage data provided by the Surface Transportation Board for 2021 in its Quarterly Wage A&B Data, specifically Group 200 to represent professional and administrative staff, and Group 300 to represent a proxy for railroad contractors similar in duties to maintenance of way and structures employees (<https://www.stb.gov/reports-data/economic-data/quarterly-wage-ab-data/>).

Administrative time spent per Class I freight railroad for initial consultation is 44 hours. Administrative time spent per Class I freight railroad for consultation revision tasked by FRA is 22 hours, half the time needed for the initial consultation.

Administrative time spent per ISP railroad for initial consultation is 20 hours.

Administrative time spent per ISP railroad for consultation revision tasked by FRA is 10 hours. Contractor time spent for initial consultation (applies to Class I and ISP RRs) is 1.25 hours per contractor. Contractor time spent for consultation revision tasked by FRA is the same as the initial consultation and is 1.25 hours per applicable contractor. This equivalent contractor time assumes that a component of the FRA-tasked update is insufficient consultation with the employees/contractors that needs to be completed, applicable to Class I and ISP railroads. Administrative time spent by an ISP railroad making substantial changes to its RRP in compliance with the rule is 15 hours.

Administrative time spent by a Class I railroad making substantial changes to its RRP to comply with the rule is 40 hours. Contractor time spent to update materials for RRP revision is 10 minutes per contractor. This economic analysis assumes that railroads will only revise portions of their RRP and therefore the average amount of time spent by each contractor will not be greater than for full consultation on the initial RRP. Administrative time spent per railroad for ongoing involvement (Class I and ISP railroads) is 5 hours. Contractor time spent per railroad for ongoing involvement is 15 minutes per contractor on average.

10. Discount Rates

Discount rates of 3 and 7 percent are presented to meet the guidelines set forth in OMB Circular A-4. Discount rates are intended to reflect the value of money over time in order to reveal opportunity cost. The 7 percent discount rate is an estimate of the average rate of return to private capital in the U.S. For regulatory changes that do not

primarily impact the allocation of capital, but rather impact consumption, the lower discount rate of 3 percent is a historical approximation of that impact.

Because this analysis does not attempt to quantify the safety impacts of either alternative, it skews the results of the discounting because it lacks the relative comparison to how net impacts would be experienced over time.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rulemaking would have a significant economic impact on a substantial number of small entities, and has therefore prepared this IRFA. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA seeks comment on the economic impacts of this proposed rulemaking on small entities.

1. Reasons for Considering Agency Action

This action provides notice and solicits comment on FRA's position that the RRP final rule should retain § 271.3(c) and is responsive to petitions of reconsideration received by FRA.

2. A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

FRA is proposing to keep part 271 in effect as published, but is using this rulemaking to gather additional public response to the proposal of retaining § 271.3(c). FRA initiated the RRP rulemaking in response to a statutory mandate set forth in section

103 of RSIA that directed FRA develop comprehensive, system-oriented, risk reduction planning requirements for Class I railroads, passenger railroads, and ISP railroads. This proposed rulemaking addresses issues raised by petitions for reconsideration that FRA received on the RRP final rule.

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. “Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 500 employees, or a “commuter rail system” with annual receipts of less than seven million dollars. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209).

The \$20 million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is using this definition for the proposed rulemaking. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity.

This proposed rulemaking would be applicable to ISP railroads, who must comply with the RRP rule. The only ISP railroads that may be considered a small entity would be those that meet the above definition. FRA estimates that the maximum number of ISP railroads would be 55, although the average number of ISP railroads over the next ten years is estimated to be 33.³⁶ It is unclear at this point how many of these ISP railroads may meet the definition of "small entity"; however, as an upper bound, even if all of the ISP railroads that are anticipated to be identified over the ten-year horizon of this analysis are small entities, they would only comprise 7 percent of the small entities. This holds true for any given year (ranging from a minimum of 1.3 percent in Year 1 to a maximum of 7 percent in Year 10 and beyond) and the ten-year average (4.2 percent).

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Class of Small Entities That Would Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

Since this rulemaking is not proposing to make any revisions to the existing regulation, small railroads are not required to take any action for reporting, recordkeeping, or other compliance matters. Therefore, this proposed rulemaking would not have any economic impact on small entities.

³⁶ There are expected to be 10 ISP railroads in Year 1, followed by 5 additional ISP railroads each year after, which will accumulate to, and plateau at, 55 in Year 10 and thereafter. Averaged across the ten-year time horizon, the result is 32.5 per year, rounded up to 33.

5. Identification, to the Extent Practicable, of All Relevant Federal rules that May Duplicate, Overlap, or Conflict with the proposed rule

FRA is not aware of any relevant Federal rule that duplicates, overlaps with, or conflicts with the proposed regulations in this NPRM.

FRA invites all interested parties to submit comments, data, and information demonstrating the potential economic impact on small entities that would result from the proposed rulemaking or any of the alternatives. FRA particularly encourages small entities that could potentially be impacted by the proposed rulemaking and any alternatives to participate in the public comment process. FRA will consider all comments received during the public comment period for this NPRM when making a final determination of the NPRM's economic impact on small entities.

6. A Description of Significant Alternatives to the Proposed Rule

This NPRM does not propose to make any rule changes but opens the opportunity to receive data and comment about a specific section of the previously published RRP final rule, § 271.3(c). There are two significant alternatives to the rule as proposed. The proposed rulemaking states that FRA may decide to amend § 271.3(c) in response to the data and comments received during the public comment period.

One significant alternative would be the removal of § 271.3(c), which would eliminate the requirement that railroads consider certain contractors, specifically their operationally significant contractors, as directly affected employees in complying with the consultation and employee involvement requirements of the RRP rule. This alternative is discussed in this NRPM and would decrease the administrative burden. Small railroads would receive cost savings, however marginal, from this change.

A second alternative would move in the opposite direction, expanding the applicable pool of contractors subject to § 271.3(c) to include safety significant

contractors a railroad identifies in its RRP plan pursuant to § 271.101(d). While this could impact additional small entities, that impact is expected to be marginal.

FRA anticipates that neither of the significant alternatives to this proposed regulation that have been outlined above would disproportionately place any small railroads that are small entities at a significant competitive disadvantage.

C. Paperwork Reduction Act

There are no new collection of information requirements contained in this proposed rulemaking and, in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., an information collection submission to OMB is not required. The recordkeeping and reporting requirements already contained in the RRP final rule (*see* 85 FR 9262) were approved by OMB on June 5, 2020. The information collection requirements thereby became effective when they were approved by OMB. The OMB approval number is OMB No. 2130-0610, and OMB approval expires on June 30, 2023.

D. Environmental Impact

Consistent with the National Environmental Policy Act³⁷ (NEPA), the Council on Environmental Quality's NEPA implementing regulations,³⁸ and FRA's NEPA implementing regulations,³⁹ FRA has evaluated this proposed rulemaking and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.⁴⁰ Specifically, FRA has determined that this proposed rulemaking is categorically excluded from detailed

³⁷ 42 U.S.C. 4321 *et seq.*

³⁸ 40 CFR parts 1500 through 1508.

³⁹ 23 CFR part 771.

⁴⁰ *See* 40 CFR 1508.4.

environmental review pursuant to 23 CFR 771.116(c)(15), “[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.”

The purpose of this rulemaking is to solicit information on whether FRA should retain a provision in the RRP final rule clarifying that contractors who perform significant portions of a railroad’s operations are considered the railroad’s directly affected employees for purposes of the rule. This proposed rulemaking would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.⁴¹ FRA has concluded that no such unusual circumstances exist with respect to this proposed rulemaking and the proposal meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.⁴² FRA has also determined that this proposed rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).⁴³

E. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2C⁴⁴ require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

⁴¹ 23 CFR 771.116(b).

⁴² See 54 U.S.C. 306108.

⁴³ See Department of Transportation Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

⁴⁴ 91 FR 27534 (May 10, 2012).

environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this proposed rulemaking under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

F. Federalism Implications

Executive Order 13132, “Federalism,”⁴⁵ requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, an Agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed the proposed rulemaking under the principles and criteria contained in Executive Order 13132. This proposed rulemaking would not have substantial direct effects on the States, on the relationship between the national

⁴⁵ 64 FR 43255 (Aug. 10, 1999).

government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that the proposed rulemaking would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 would not apply. However, this proposed rulemaking could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this proposed rulemaking under the principles and criteria in Executive Order 13132. As explained above, FRA has determined this proposed rulemaking has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement for this proposed rulemaking is not required.

G. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995,⁴⁶ each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in

⁴⁶ Pub. L. 104-4, 2 U.S.C. 1531.

law). Section 202 of the Act⁴⁷ further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the Agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This proposed rulemaking would not result in such an expenditure, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”⁴⁸ FRA has evaluated this proposed rulemaking in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

I. Tribal Consultation

FRA has evaluated this proposed rulemaking under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. This proposed rulemaking would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

J. Privacy Act Statement

⁴⁷ 2 U.S.C. 1532.

⁴⁸ 66 FR 28355 (May 22, 2001).

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.transportation.gov/privacy. To facilitate comment tracking and response, FRA encourages commenters to provide their names, or the name of their organization; although submission of names is optional. Whether or not commenters identify themselves, FRA will fully consider all timely comments. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Amitabha Bose,

Administrator.

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